vss

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.321 OF 2006

Jitendra Gopaldas & Anr. ... Petitioners

V/s.

Shiv Kumar Jatia & Ors. ... Respondents

Mr.V.R. Dhond with Mr.Shukla for Petitioner
Mr.Soli Cooper with Mr.V.P. Singh and Mr.Arun Siwach for Respondents 1 to 3
Mr.Milind Vasudeo with Mr.Prashant Beri for Respondent Nos.4 and 5

CORAM: **SMT.NISHITA MHATRE, J.**

DATED: **AUGUST 19, 2006**

P.C.:

. The Petitioners have invoked section 9 of the Arbitration and Conciliation Act and have claimed an injunction against the respondents from transferring or giving effect to the transfer application if any received for the transfer of 15% shares. The petitioners claim that they are entitled to these shares. An injunction is also sought against Respondent Nos.4 and 5 from dealing with those 15% shares presently held by them. Certain other reliefs have also been claimed including appointment of the Receiver for taking custody of 15% shares of Respondent No.3

2. The Petitioners claim to be the shareholders of Respondent No.3 company to the extent of 15% of the share capital. Respondent Nos.1 and 2 are shareholders and Directors of Respondent No.3 company. Respondent

No.4 is a company registered in Hongkong and is promoted by Respondent No.3 alongwith one of its employees B.S. Narayansami. Respondent No.5 company is incorporated in Indian of which Respondent No.3 and two of the members of the family of B.S. Narayansami are the promoters. According to the Plaintiff, Respondent Nos.4 and 5 are mere fronts for Respondent Nos.1, 2 and 3.

3. The Petitioners have subscribed to the shares of Respondent No.3 company pursuant to the share subscription agreement which is dated 30.4.2004. A shareholders' agreement was also executed by the Petitioners and Respondent Nos.1, 2 and 3 on 30.4.2004 A third agreement was executed between the same parties on that day wherein it was agreed that in the event the promoters i.e., Respondent Nos.1 and 2 issued further shares of the Respondent No.3 company on better terms and conditions than those offered to the Petitioners, then the Petitioners would be entitled to the same terms. The Petitioners accordingly paid Rs.122,900,000/- by two cheques. The petitioners claim that these cheques were encashed by Respondent No.3. Correspondence ensued between the petitioners and Respondent Nos.1, 2 and 3 regarding compliance of the terms and conditions of the agreements. On 18.12.2005, the petitioners received a letter from the advocate of Respondent No.3 indicating that Respondent No.3 had decided to return the aforesaid amount that the petitioners had paid, by two separate pay orders. The

petitioners refused to accept the amount and recorded their protest. It appears that the respondents deposited the amounts in the petitioners' accounts with the I.C.I.C.I Bank limited without the knowledge and consent of the Petitioners, thereby terminating the agreements.

4. The arbitral Tribunal was set up in accordance with the clause for arbitration contained in the share subscription agreement. An application under section 17 of the Arbitration and Conciliation Act, 1996 was moved before the learned Arbitrators by the petitioners claiming an injunction against the transfer of the 15% shares of Respondent No.3 company. This application was opposed by the Respondents. The arbitral Tribunal by an order dated 1.5.2006 has held that it was not competent to grant the reliefs claimed by the claimants in view of the limited scope of its jurisdiction under section 17 of the Act. The Claimants i.e., the Petitioners herein, were therefore, given liberty to make an application before the competent forum. Hence, the present Petition.

5. The learned Counsel for Respondent Nos.1, 2 and 3 raises a preliminary objection to the maintainability of the present arbitration petition. He points out that the provisions of the said Act cannot be invoked unless the Petitioners decide that they would not claim the same reliefs before any other forum. The learned

Counsel points out that in paragraph 26 the petitioners have made a specific averment that they are contemplating and are in the process of filing a separate suit for the purpose of seeking necessary reliefs. The learned Counsel submits that prayer clause (a) of the arbitration petition is also indicative of the Petitioner's intention to obtain relief in the present petition until other legal remedies are adopted by the petitioners to restrain Respondent Nos.1, 2 and 3 by an injunction from transferring the 15% shares of Respondent No.3 company. He relies on the judgment of the Apex Court in the case of *M/s.Sunderam Finance Ltd. v/s. M/s.NEPC Indian Ltd.,* **AIR 1999 SC 565.** Paragraph 20 of the aforesaid judgment reads as follows:

> 20. When a party applies under Section 9 of the 1996 Act it is implicit that it accepts that there is a final and binding arbitration agreement in existence. It is also implicit that a dispute must have arisen which is referable to the arbitral tribunal. Section 9 further contemplates arbitration proceedings taking place between the parties. Mr.Subramaniam is, therefore, right in submitting that when an application under Section 9 is filed before the commencement of the arbitration proceedings there has to be manifest intention on the part of the applicant to take recourse to the arbitral proceedings if, at the time when the application under Section 9 is filed, the proceedings have not commenced under Section 21 of the 1996 Act. In order to give full effect to the words "before or during arbitral proceedings" occurring in Section 9 it would not be necessary that a notice invoking the arbitration clause must be issued to the opposite party before an application under Section 9 can be filed. The issuance of a notice may, in a given case, be sufficient to establish the manifest intention to have the dispute referred to arbitral tribunal but a situation may so demand that a party may choose

> to apply under Section 9 for an interim measure even before issuing a notice contemplated by Section 21 of the said Act. If an application is so made the Court will first have to be satisfied that there exists a valid arbitration agreement and the applicant intends to take the dispute to arbitration. Once it is so satisfied the Court will have the jurisdiction to pass orders under Section 9 giving such interim protection as the facts and circumstances warrant. While passing such an order and in order to ensure that effective steps are taken to commence the arbitral proceedings, the Court while exercising jurisdiction under Section 9 can pass conditional order to put the applicant to such terms as it may deem fit with a view to see that effective steps are taken by the applicant for commencing the arbitral proceedings. What is apparent, however, is that the Court is not debarred from dealing with an application under Section 9 merely because no notice has been issued under Section 21 of the 1996 Act.

6. Therefore, it will be necessary to ascertain whether there is a manifest intention on the part of the Petitioner to take recourse to arbitral proceedings only and not to any other proceedings, before this Court exercises jurisdiction under section 9.

7. Paragraph 26 of the Petition reads as under:

> 26. The Petitioners say that they are also contemplating and are in the process of filing separate suit for the purpose of seeking necessary reliefs as advised. In view of the same, it is absolutely necessary and in the interest of justice that this Hon’ble Court be pleased to grant necessary reliefs in order to protect their interest.

8. Thus, it is apparent that the Petitioners are not restricting their remedy for redressal of their grievance to arbitral proceedings alone. Their intention is to adopt other proceedings as well for the

same reliefs. This is apparent from prayer clause (a) of the Petition which reads as under:

> (a) That it is just and necessary during the pendency of arbitral proceedings and till necessary other legal remedies are adopted by the Petitioners to restrain and the Respondent No.1 to 3 by an order and injunction at this Hon'ble Court from further transferring and/or giving any effect to the transfer application if any received for transfer of 15% shares to which the Petitioners are entitled to.

9. In such circumstances, in my view, there is no need to exercise jurisdiction under section 9 of the aforesaid Act. The Petitioners cannot invoke section 9 as a stop gap arrangement between adopting arbitral proceedings and any other proceedings which they wish to resort to.

10. In this view of the matter, the Petition is rejected.